STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v Supreme Court No. 154565

LAVERE DOUGLAS-LEE BRYANT,

Defendant-Appellee.
_____/

Wayne Circuit Court No. 2013-009087-01-FC
Michigan Court of Appeals Docket No. 325569

DEFENDANT-APPELLEE'S REPLY TO PLAINTIFF-APPELLANTS APPLICATION FOR LEAVE TO APPEAL

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COUNTER STATEMENT OF APPELLATE JURISDICTION

Appellee was convicted in the Wayne County Circuit Court by jury trial. A judgment of sentence was entered December 11, 2014. A claim of appeal was filed January 9, 2015 by the trial court pursuant to his request for appointment of appellate counsel, received January 2, 2015, as authorized by MCR 6.425(F)(3). The Michigan Court of Appeals had jurisdiction in this appeal of right pursuant to Mich Const 1963, art 1, §20; MCL 600.308(1), MCL 770.3, MCR 7.203(A), MCR 7.204(A)(2). This application is made within 56 days after the Court of Appeals decision. This Court has jurisdiction to consider this application for leave to appeal pursuant to MCR 7.301(A)(2).

COUNTER STATEMENT OF QUESTIONS PRESENTED

I

WHETHER THE PROSECUTION FAILED TO PRODUCE LEGALLY SUFFICIENT EVIDENCE TO IDENTIFY APPELLEE AS THE PERPETRATOR OR PROVE HIS GUILT BEYOND A REASONABLE DOUBT.

Defendant-Appellee answers this question "Yes".
Plaintiff-Appellant answered this question "No".
The court below answered this question "No".
The Michigan Court of Appeals answered this question "No".

II

WHETHER THE TRIAL COURT VIOLATED APPELLEE'S DUE PROCESS RIGHTS BY ALLOWING THE PROSECUTOR TO PRESENT EVIDENCE OF APPELLEE'S INVOLVEMENT IN SEVERAL ALLEGATIONS OF SEXUAL HARASSMENT, WHERE THE SHEER NUMBER OF OTHER ACTS RESULTED IN UNFAIR PREJUDICE; AND BY PERMITTING PROSECUTION WITNESSES TO TESTIFY TO APPELLEE'S PRIOR INCARCERATION.

Defendant-Appellee answers this question "Yes".
Plaintiff-Appellant answered this question "No".
The court below answered this question "No".
The Michigan Court of Appeals answered this question "Yes".

III

MUST APPELLEE MUST BE GRANTED A NEW TRIAL BECAUSE POLICE TESTIMONY IDENTIFYING HIM AS THE PERSON IN THE STORE VIDEO IMPERMISSIBLY ENCROACHED ON THE PROVINCE OF THE JURY.

Defendant-Appellee answers this question "Yes".
Plaintiff-Appellant would answer this question "No".
The court below would answer this question "No".
The Michigan Court of Appeals answered this question "No".

IV

WHETHER THE PROSECUTOR VIOLATED APPELLEE'S STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS TO A FAIR TRIAL, AND USURPED THE FUNCTION OF THE JURY TO BE THE SOLE JUDGE OF WITNESS CREDIBILITY AND TO RETURN A VERDICT BASED SOLELY ON THE EVIDENCE, WHEN SHE ENGAGED IN MISCONDUCT BY TELLING THE JURY THAT APPELLEE WAS A LIAR.

Defendant-Appellee answers this question "Yes".
Plaintiff-Appellant would answer this question "No".
The court below would answer this question "No".
The Michigan Court of Appeals answered this question "No".

COUNTER STATEMENT OF FACTS

"M1" and "M2" refer to transcripts of the August 1, 2014 and November 7, 2014 motion hearings. "T1"-"T11" and "S", respectively, refer to transcripts of the November 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 2014 jury trial and December 11, 2014 sentencing, all held in the Wayne Circuit Court before the Hon. Qiana D. Lillard. Numbers following these transcript references cite specific transcript pages.

Defendant-Appellee Lavere Douglas-Lee Bryant (hereinafter "Appellee") was charged as follows: Counts 1 through 4 alleged first degree premeditated murder [MCL 750.316(a)] and felony murder [MCL 750.316(b)] as to Joseph Orlando and Brenna Machus. Counts five through secen alleged armed robbery [MCL 750.530] as to Orlando or Machus, unlawful imprisonment [MCL 750.349b] as to Machus and felon in possession of a firearm [MCL 750.224f]. Count 8 alleged felony firearm [MCL 750.227b] during the commission of or attempt to commit counts 1through 7. The offenses were alleged to have occurred July 15 through 16, 2013 at 22631 Newman in Dearborn.

At a hearing conducted August 1, 2014, the People's notice of intent to introduce evidence of other acts and motion to admit such evidence at trial was granted in part and denied in part. (M1 3-24). Defense counsel's motion to exclude hearsay and irrelevant evidence was taken under advisement subject to hearsay objections to witness testimony at trial and an in camera review of the proposed documentary evidence. (M1 24-31). Counsel's motions to suppress Appellee's identification in a store surveillance video, (M1 32-34), and to suppress Appellee's statement were taken under advisement pending a review of the video by the trial court. (M1 34-37). At a hearing conducted November 7, 2014, counsel's motion to suppress evidence of video recovered from a cell phone and a computer at Appellee's address were granted in part in and denied in part. They would not be viewed by the jury, but the police were permitted to say what was recovered from the devices. (M2 3-20). The identification evidence was admitted. (M2 22-24). Appellee's motions for substitution of counsel, to disqualify the prosecutor and represent himself were denied. (M2 37-62).

On November 10, 2014, Appellee appeared for trial. After preliminary matters, (T1 3-6, 166, 194-201; T2 6), jury selection, (T1 7-165, 170-171), preliminary jury instructions (T1 172-190) and opening statements by the prosecution and the defense, (T2 8-25), the following was presented:

Erica Collins stated that in July, 2013 she worked at the Family Dollar with Orlando and Machus.. She opened the store on the morning of July 15, 2013. Orlando and Machus arrived that afternoon and were scheduled to work until closing. (T2 26-32). The store is equipped with surveillance cameras, (T2 37), which were operational and focused on the cash register and front door areas. (T2 50-52).. When she returned to work the following morning she noticed Orlando's and Machus' vehicles in the parking lot. She called both and sent Machus a text message but received no response. She then entered the store and saw Orlando's phone on the floor. She exited the store and called 911. (T2 39-42). When the police arrived, she provided the store keys and remained outside. She entered the store later that day to identify Orlando's body. An audit indicated that less than $1,000 was missing from the safe, which was open. Typically, it contained small bills. (T2 43-46, 56). A register drop box, where the large bills, was not disturbed. (T2 63-67). Collins stated she knows Appellee as a Family Dollar field specialist who worked at her store one day several months earlier. (T2 46-49, 54-55). She knew Machus to have a store key (T2 33) on a lanyard. (T2 45). Machus' store key was missing. (T2 49). Her safe key was present. (T2 59-61).

Dearborn Police Officer Brian Yankuri stated that at 7:20 a.m. July 16, 2013 he responded to the 911 dispatch with Corporal Kowloski and Officer Bruit. He saw the two cars in the parking lot, spoke with Collins and entered the store. A cell phone and cash register drawers were on the floor. Orlando was found lying on the locked bathroom floor in a pool of blood. The area was secured, the detective bureau was notified and Machus was listed as a missing person. (T2 72-78).

Greta Delgado stated that on the evening of July 15, 2013 she was shopping at the store. A male and a female were on duty. While there, she had contact with a short, stocky friendly black male with a medium complexion. She deemed that Appellee was also medium complected. (T2 83-87). The man she saw wore a heavy coat without a hood. His face was not covered. (T2 87-88).

Kury Kruger works nearby. Leaving work at about 7:30 or 8:00 p.m. July 15, 2013, a man and a woman slowly walked in front of his car. They were carrying large grocery bags. It was raining heavily. The man wore jeans and tennis shoes. His head was covered by a hood. He made

a gesture to Kruger not unlike the gesture saw made by the person in the store video. (T2 89-99).

Thomas Lance was a Dearborn Police Sergeant in July, 2013. He was assigned to retrieve the surveillance video. It depicted a person entering the store at 7:26p.m. July 15, 2013; Machus leaving the store July 15, 2013 with a person wearing a dark coat, a hood and jeans at 7:56 p.m. July 15, 2013; and that person returning at 5:18 a.m. July 16, 2013 and leaving 3 minutes later. (T2 101-119). About 6 months of store video was saved. Lance was asked to search it for images of Appellee and Appellee's girlfriend, Astrin Chandler. According to Lance, on April 3, 2013, April 15, 2013, April 17, 2013 and May 28, 2013, "a person who appears to be Mr. Bryant" entered the store. Also on July 14, 2013, "a person who appears to be Astrin Chandler" entered the store. (T2 126-133).

Dearborn Police Corporal Cyndi Maxwell works in the crime lab. She arrived at the scene with Sergeant Wroblewski and Corporal Denek. Her job was to photograph the scene, collect evidence, take measurements and do a sketch. (T2 151-152). She used the sketch and photos to describe the scene to the jurors, including photos of Orlando's body, phone and blood spatter, as well as a spent bullet and two spent shell casings and packages of fetid bloody black towels. (T2 155-158, 166-195). Various fingerprints lifted from the store (T2 195-197), had no evidentiary value. (T3 5-9, 35-37). On July 18, 2013 Maxwell went to a dirt road along the Southfield Freeway service drive, a mile an a half fro m the Family Dollar Store, where she drew a sketch and photographed Machus and tire impressions from the area where Machus' decomposed body was found. (T3 9-24). She later went to the office of the Wayne County Medical Examiner's Office to recover Machus' maggot infested clothing, (T3 25, 32), which was sent to the State Police Crime Lab. (T3 32-33). She also went to the Dearborn Police garage to process Machus' car, Appellee's Jeep and collect carpet samples from both, which were also sent to the State Police Crime Lab for analysis. (T3 27-31, 48).

Sally Jenkins managed the Dearborn branch of Flagstar Bank in July, 2013. She knew Appellee as a bank customer. (T3 60-61). She recalled him telling her he worked for the Family Dollar and that he was upset about being passed over for a promotion. (T3 65-66). She is trained to observe people and their mannerisms, and recalled that he always wore clean white gym shoes and

a heavy coat. On July 17, 2013 she was viewing news reports of the Dollar Store case, from which she identified Appellee as the person in surveillance video clips shown in the report. She based her identification on the mannerisms of the person and the way that person raised his hand. (T3 62-64). Bank surveillance video of Appellee was used to compare with Family Dollar video. (T3 67-78). In several bank videos he wore black shoes. He also wore several different coats. (T3 78-79, 81-83).

Paul Holt worked with Appellee at the Dearborn Family Dollar store. (T3 98-100). After hearing about the case he viewed the surveillance video, from which he identified Appellee by the mannerisms, body language, walk, coat and shoes. (T3 107-109). According to Holt, Appellee was fired for sexual harassment, and Machus said Appellee made her feel uncomfortable. (T3 103-106). Hold reported receiving Instagram contacts from Appellee on August 12, 2013, (T3 109-111, 114-115), but acknowledged that Appellee was in custody at the time. (T3 116). Further, that Appellee had previously been terminated for an armed robbery. In that incident, it was determined that the actual robber wore the same style of clothing as Appellee, who was then reinstated. (T3 116-121).

Matthew Steingesser is a Family Dollar regional loss prevention manager. He investigates theft and human resource issues. According to Steingesser, Appellee's employment was terminated for sexual harassment and inappropriate behavior. (T3 125-127). His review of the store business records indicated that one or two black towels offered for sale were missing. (T3 129-131, 137-141).

Dearborn Police Corporal Benjamin Harless obtained surveillance video from several other nearby businesses. (T3 146-153, 155-156). Recording from a few stores tracked a black Jeep. (T3 158-160). He could not be certain they were the same Jeep. (T3 164). A Kroger card found at the store was not registered. Video of Kroger transactions using the car indicated that the customer was a elderly male. (T3 154). According to Harless, video of a nearby restaurant showed "the defendant, Mr. Bryant, coming in. He enters the store, appears to place an order, exits, comes back in, and then picks up his food and exits a second time. One observation I made while reviewing is that upon exiting the door, he makes a very discerned motion, of using his arm as he pushes the door open, and again, I noted that it appeared to be very similar in the way that he – that the suspect had opened the

door while leaving the Family Dollar, again using his arm in the exact same manner." (T3 162-163).

Dearborn Police Corporal Michael Gracier stated that on July 18, 2013 he was part of a team conducting plain clothes surveillance of Appellee. (T3 169-171). Appellee drove to his apartment complex in a black Jeep, using an "unusual" route. He later drove about Dearborn, parked and looked in all directions before exiting and walking to various locations. He then returned home, again taking an indirect route. (T3 172-177). The following day he saw Appellee take a convoluted route to work which included a stop at a dumpster, and a similar route home which included stops at a car wash and a garbage can. He later drove about making abrupt turns which Gracier termed "highly unusual", twice passed slowly through the spray of an open fire hydrant and repeatedly circled about an area of unoccupied houses and vacant lots, returned to the car wash and rummaged about his vehicle before walking along the Lodge freeway where he was arrested. (T3 180-200). The surveillance crew did not collect the garbage. (T3 201). He agreed that Appellee engaged in "basically everyday activities" and was unfamiliar with Appellee's regular driving route. (T3 202).

Kilak Kesha is an assistant Wayne County Medical Examiner and an expert in forensic pathology, (T4 6-8). On July 17, 2013 Kesha performed an autopsy on Orlando, (T4 8), finding an entrance gunshot wound on the right side of the head just above the ear, with soot and stippling on the tissue around the wound. It traveled right to left, front to back and upwards, passing through the right side of the scalp, the brain and the left side of the scalp where it exited. (T4 11-12). It was a close range shot, made from six inches and two feet away. (T4 13). A second gunshot wound was a contact wound to the back of the head, slightly on the left side. The bullet traveled from back to front, right to left and upwards. It ;passed through the skin and soft tissue at the back of the head, fractured the dkull and passed through the first vertibre , entered the skull on the left side of the base, passed through the front of the brain and exited the front of the skull. (T4 14). The cause of death was multiple gunshot wounds top the head. (T4 15). The manner of death was homicide. (T4 18).

Trenton Daniels stated that at about 6:30 or 7:00 a.m. July 18, 2013 he was driving a moped in the area of Michigan Avenue and the Southfield service drive when he came upon a female body

on the side of the road. He determined that she was deceased and called 911. (T4 19-24). He was at the same area at about 8:00 p.m. July 16, 2013 and did not see a body at that time. (T4 27-28).

Over counsel's objection, (T4 37-40), Ibrahim Dakroub stated he is a detailer at a carwash, and that on July 18, 2013 Appellee came to have the interior of his vehicle detailed. Although Appellee previously had full service washes, he had not previously requested detailing. (T4 41-49).

Former Dearborn Police Sergeant James Wroblewski stated that at 9:00 a.m. July 16, 2013 he responded to the Family Dollar shooting to supervise crime lab officers Maxwell and Danek and assist in collecting, video recording and packaging evidence. (T4 51-52). On the morning of July 18, 2013 he went to the area of Southfield and Michigan to photograph and supervise the collection of evidence where Machus had been located. The following day he went to the Dearborn Police garage and processed a Jeep which had been impounded at a carwash. (T4 53-56). He took cuttings of "suspicious stains" from the left rear passenger seat, which he submitted to the State Police Trace Unit. (T4 62). He found no interior fingerprints, (T4 63-65, 68, 76),which he found unusual, (T4 75), but did recover a cutting from a stain on the headliner, a Kroger receipt, Flagstar Bank receipts, a July 18, 2013 receipt for trash bags and a cleaning product and trace evidence lifts. (T4 65-68, 79-94). Exterior fingerprints were unusable or did not match Appellee or either victim. (T4 69-70).

Deputy Chief Wayne County Medical Examiner Leigh Hlavaty is an expert in forensic pathology. On July 19, 2013 she performed an autopsy on Machus. (T4 108-110). Although a driver's license and bank card were found in a shoe, identification was made July 23, 2014 by dental records due to decomposition. (T4 114). She could not determine the time of death, but estimated that it was closer to July 15, 2013 when Machus was last seen than to July 18, 2013 when the body was recovered. (T4 118-119). There were gunshot entrance and exit wounds to the skull, fractures radiating backwards to the left side of the skull through the frontal bone to the right side and fractures extending forward through the facial bones to the nasal bone. As there was no skin present, Hlavaty would not determine distance. (T4 120-123). No bullet was recovered. (T4 124). Vaginal and rectal swabs and fingernail clippings were collected for DNA testing. (T4 125-126). Hlavaty

did not find any seminal fluids present, and discerned no vaginal or rectal trauma. (T4 129-130). The cause of death was a gunshot wound to the head. The manner of death was homicide. (T4 128).

Ashley Sulla was Machus' friend, partner and roommate. She last say Machus on July 15, 2013. (T4 133). She knew Machus to keep identification in her back pocket or bra. (T4 134-135).

Dearborn Police Corporal James Ford was part of the surveillance team. (T4 137). On July 19, 2013 he went to Appellee's apartment complex. Over a 35 to 40 minute period he saw Appellee remove from a Jeep a suitcase and a diaper box containing a spray bottle and paper towels, take them into the building, return with a garbage bags, place items from the Jeep into the bags, return to the building, reenter the Jeep with a white bag and pause 4- 5 minutes before driving off. (T4 138-149).

Dearborn Police Sergeant Matthew Cannon was n charge of surveillance. On July 19, 2013 he followed Appellee to the carwash. As Appellee walked away from the Jeep, he moved in and arrested Appellee on an outstanding warrant for failing to register as a sex offender. (T4 151-155).

Dearborn Police Corporal Joshua Urbiel , another member of the surveillance crew. After witnessing the arrest he returned to Appellee's apartment complex, searched an apartment dumpster and recovered two grocery bags. Inside one grocery bag was a Family Dollar bag. (T4 157-167).

Dearborn Police Corporal Alfred Grezgorek is an evidence technician. On July 19, 2013 he went to the Allen Park Motor Lodge, Appellee's apartment complex and the carwash. From the lodge dumpster he recovered a garbage bag which he turned over to Corporal Myer. At the complex dumpster and inside Appellee's apartment unit he photographed items recovered by other officers, including a pair of white Nike tennis shoes. At the carwash he impounded the Jeep. (T4 169-183).

Dearborn Police Corporal Emilee Williams stated that on July 19, 2013 she assisted Sergeant Mann in the execution of a warrant to search Appellee's apartment. (T5 4-5). Inside luggage she found men's clothes and toiletries. She saw Corporal Maxwell recover a pair of jeans from a diaper box. On a shoe rack she found a pair of Nike Air Max shoes. From the master bedroom a laptop computer, three phones and a tablet were recovered, along wiht Appellee's identification and a Family Dollar pay stub. They were all taken to the police station and placed on evidence. (T5 8-29).

Sarah Coulter was a friend of Machus who worked at the Inkster Family Dollar Store. Appellee was her store assistant manager. (T5 34-36). Machus frequently visited her store when Appellee was present. She was working there when he was fired for sexual harassment. She was aware that he drove a Jeep. (T5 36-38). After the Dearborn store shooting she recognized Appellee from video clips presented in news reports because "he wore the same clothes that he would always wear", those being baggy blue jeans, white sneakers and a hoodie under a black Carhartt. (T5 39-48).

Nicole Ricks-Coleman managed the Dearborn Family Dollar store until June, 2013 and knew Appellee as a fellow store employee. (T6 6). According to Ricks-Coleman, Appellee would always have issues with other female store employees. (T6 7-10). She identified Appellee in the surveillance video by his body structure, his Nike Air force One gym shoes and jacket. (T6 11-15, 22-23). She knew of complaints about Appellee, but never received any inappropriate comments from him, (T6 16), and she wrote a letter of recommendation for his work performance. (T6 20).

Alexis Coleman is Nicole Ricks-Coleman's daughter, worked at the store from August, 2011 until May, 2012 and knew Appellee. (T6 32-33). She felt Appellee inappropriately took a photo of her, which he said was for his caller ID. He also made a comment about her breasts. (T6 33-34).

Amanda Priebe is employed at the Garden City Family Dollar. (T6 41-42). She knew Appellee from when he filled in as an assistant manager at her store. (T6 43). According to Prieve, Appellee made an inappropriate comment to her, telling her that she looked good in jeans. (T6 44). As store manager, she received complaints from female customers and store employees. (T6 45).

Dionna Wilson is an assistant manager at a Detroit Family Dollar. (T7 56). She knew Appellee from working with him at another Family Dollar in early 2012. (T6 57). She stated that Appellee inappropriately comment to her that he liked the view from her back side. She did not see or hear of him making any sexual comments to other people. (T6 58). She saw the video 4 or 5 times and felt the person had the person had Appellee's build, size, complexion and shoes. (T6 61-63).

Aron Watkins worked at several Family Dollar stores and worked with Appellee at some of the stores. Watkins observed him act in a manner which made women uncomfortable. (T6 76-79).

Alyson Holt worked at the Inkster Family Dollar from August to December, 2012 and knew of Appellee. She reported Appellee for standing near the bathroom as she was exiting. (T6 83-86).

Tannisha Fitzpatrick worked at the Inkster Family Dollar in April, 2013. Appellee was the store manager. (T6 89-91). She reported him because "he basically followed me around the store on several occasions" which made her feel uncomfortable. (T6 91-92). In July, 2013 she viewed the surveillance video and identified Appellee by his "presence" build and "approach". (T6 92-93). She recalled Appellee telling her that he carried a .9mm in the store to protect his workers. (T6 94).

Cristel Johnson was hired at the Inkster Family Dollar in October, 2012 by Appellee. She stated that his inappropriate comments made her feel sexually harassed and uncomfortable. She also stated she witnessed similar behavior involving customers and other co-workers. (T6 103-106). She identified Appellee as the person in the surveillance video by his body and clothing. (T6 107-110).

Cassidy Flaherty was a Family Dollar field specialist from 2011 to 2013, and met Appellee early in her employment. (T6 115-116). In 2012 while riding store-to-store with Appellee in Appellee's Jeep he saw a silver handgun with a black grip on the floor behind the driver's seat. Three reports of Appellee harassing store employees were brought to his attention. (T6 116-123).

Jasmin Gregory, who worked at the Inkster Family Dollar, knew Appellee as a co-worker. According to Gregory he told her she was beautiful, asked to date her, touched her thigh, made inappropriate sexual comments to her and heard him say things to other store females. (T6 128-132).

David Rowe is Appellee's brother. Row stated that months before the shooting Appellee said someone was looking in his windows and asked if he knew anyone selling a gun. (T9 9-13). He also told the police that after the shooting Appellee was trying to sell a Smith & Wesson 45 clip, but avered that part was untrue and was said after being promised he would be released. (T9 15- 21). He did not recognize his brother as the person in the Family Dollar store surveillance video. (T7 29).

Astrin Chandler is Appellee's girlfriend. (T7 31-32). She recalled that on July 15, 2013 Appellee wore green cargo pants a black t-short. (T7 98). They left home at about 6:20 p.m., went to a grocery store and a party store and returned home at about 7:20 p.m. She prepared dinner while

he cleaned a stain on the back seat of his Jeep where they had sex. He returned at about 8:40 p.m., went back downstairs and returned again at about 9:00 p.m. (T7 33-36, 46, 73-78, 88-91). They went to bed at about 10:00 p.m. (T7 40, 47). On July 20, 2013 she told Dearborn Police he did not return until 9:30 p.m. (T7 37). She was not sure which of the times was more accurate. (T7 39-40). Her statement to the police was made while under threat of being charged as an accomplice. (T7 49).

Chandler did not know why Appellee's Family Dollar employment was terminated, (T7 42-43), but he obtained a new job the next day which paid more money. (T7 71-72). It was not unusual for him to have packed luggage "because I throw him out a lot". (T7 45). After seeing news reports of the shooting she called Appellee, who told her he did not know and never worked with Machus or Orlando. (T7 51-53). She recalled seeing him with a gun in the apartment, but described it as a revolver. (T7 53-53). The person in the video resembled but was not Appellee. (T7 66, 87-88).

After reviewing the parameters of the August 1, 2014 ruling as to the use of evidence that Appellee failed to register as a sex offender, (T7 100-120), Michigan State Police Lieutenant Todd Johnson stated that on February 18, 2011 he went to Marquette Branch Prison because prison records staff was having problems getting a sex offender registry responsibility form signed. Johnson stated he made Appellee aware of the requirements of the Act and had him sign the form. (T7 121-126).

Michigan State Police Detective Sergeant Dean Molnar works in the Firearms and Tool Mark Unit of the Metropolitan Detroit Forensic Laboratory. He is an expert in firearms and tool mark identification. (T7 127-130). He received four containers: a fire melted ejected bullet fragment, a fire melted ejected bullet, a 40 Smith & Wesson caliber federal fired cartridge case and two 40 Smith & Wesson caliber fired cartridge cases. (T7 134). The first was a 38 caliber class bullet with a left twist. Because of the damage he could not count the lands and grooves. The second was a 40/10 millimeter caliber bullet with seven lands and grooves and a left twist. He could not tell whether the two bullets had been fired from the same gun. Typically, they are fired from semiautomatic handguns. The third and fourth all had circular firing pin impressions. Based upon their firing pin and breach phase marks, he determined all cases were fired from the same gun. (T7 136-140, 142).

Amy Altesleben works in the Biology Unit of the Michigan State Police Northville Crime Laboratory. She is an expert in biology and DNA. (T7 145-147). Altesleben received the rape kit containing a liver sample, right and left hand fingernails vulvar and anal swabs collected from Machus, (T7 150-151), a clothesline wrapper, a floor mat swab, a buccal swab collected from Appellee, blood from Orlando, a pair of white tennis shoes, a red shopping bag, two black towels, a floor mat, headliner and seat samples, door pull well, pop bottle and steering wheel swabs, a pair of blue jeans, a bleach bottle and another evidence kit collected from Machus containing dental floss and throat swabs and brown hair collected from panties. She also received firearms evidence which was turned over to the Firearms and Tool Mark Division. A pair of black pants, a black shirt, a red shirt, a bra and underwear were reviewed by Jennifer Rizk of the Trace Evidence Unit. (T7 152-156).

Altesleben chemically tested for blood on the fingernails, wrapper, clothes line, bathroom towel, two fired cartridges all tested positive for the possible presence of blood. She swabbed them for cellular material different from that person. (T7 160-162). The carpet samples also indicated the possible presence of blood. (T7 171-172). The seat samples indicated the possible presence of seminal fluid. (T7 163). The pants, shirt, underwear, throat swabs and floss did not. (T7 167). The floor mat contained no blood but possible cellular material suitable for DNA. (T7 164). The trace lifts contained several hairs with root material suitable for DNA testing. (T7 174). The vulvar swabs, vaginal slide and anal swabs were negative for seminal fluid. The headliner and front passenger door pull well and jeans were negative for the presence of blood. (T7 165-166, 168). Items containing the presence of biological materials were submitted for DNA profiling. (T7 157-158, 169-171, 174).

Dearborn Police Corporal James Isaacs is one of the officers in charge of the case. (T8 5-6). At about 8:00 p.m. July 19, 2013 he and Wayne County Deputy Sheriff Ken Muscatt met with Appellee at the Dearborn Police station. A video recording of the interview was played for the jury. (T8 7-13). A second interview from July 21, 2013was also played for the jury. (T8 43-49, 54-56).

Isaacs also completed forensic examinations on approximately ten cell phones and one Mac Book. (T8 6, 17). The computer contained Appellee's resume and tax return. (T8 18, 22-23). In

a photo placed on the computer February 20, 2013 Appellee wore a jacket. Asked to compare it with the jacket in the video, Isaacs stated "I believe it to be the same". (T8 19-21). On a phone containing what was believed to be Appellee's email, text messages, calendar and contact information (T8 27-28) he found internet history regarding pornographic websites that were viewed on the phone and two videos viewed April 15, 2012. In one entitled "Getting Even", several males enter an establishment, attack a female employee, steal money, remove her from the location, take her to a vehicle and have forcible sex with her. (T8 24-25, 72). The phone was last used in April, 2013. (T8 26). Appellee's cell phone had no activity between 6:50 p.m. and 10:00 p.m. July 25, 2013. Both calls hit off cell towers consistent with the phone being at Appellee's apartment. (T8 33, 35). Isaacs could not determine whether the Family Dollar bag came from the Dearborn store. No usable prints were recovered from the grocery bag. (T8 37-38). The $436.00 recovered from Appellee involved 56 one dollar bills, 16 fives, two tens, 9 twenties and one hundred. (T8 39-40). Rubber gloves in the carwash trash bin did not match the gloves at the Family Dollar. (T8 40-42, 73).

Michigan State Police Detective Sergeant Larry Rothman stated he was asked to clarify the April, May and July, 2013 Family Dollar and other video, but could not do so. He was further asked to compare them with Appellee and Appellee's Jeep, but he could not do that either. (T8 80-88).

Dearborn Police Detective Gary Mann was also an officer in charge. (T8 90). He spoke with tipsters and developed persons of interest (T8 91-93, 96-97; T9). He participated in the surveillance of Appellee, searching Appellee's apartment and Appellee's interrogation. (T8 93-96; T9 5-11).

Jennifer Rizk works in the Trace Evidence Unit of the Michigan State Police Northville Forensic Laboratory. She is an expert in trace evidence. (T9 13-16). She processed Machus' clothing for questioned fibers. What appeared to be carpet fiber was compared with fiber from Appellee's Jeep, which appeared to be similar. (T9 17-39). She compared fibers from Machus' pants with a tape lift from the back seat and driver's side headrest of the Jeep and found they too were similar. (T9 40-48). Fibers on a yellow vest and Machus' shoe were dissimilar. (T9 49-51, 69). Rizk acknowledged that other Chrysler vehicles also use carpeting from Invista; that Invista

also supplies carpeting to other automobile manufacturers; and that the Invista carpet is dyed by a third company which also dyes carpeting for various other automobile manufacturers. (T9 53-63).

Andrea Young is a forensic scientist in the Biology Unit of the Michigan State Police Northville Crime Laboratory and an expert in biology and DNA analysis. (T9 86-89). She performed DNA testing on Machus' liver and fingernail samples, a clothesline wrapper, a known buccal sample from Appellee, a blood sample from Orlando, shopping bag handles, towels a floor mat blood stain and hair root, a left passenger seat semen stain, pop bottles, a steering wheel cover, a bleach bottle, a fired cartridge casing from under Machus and two from the store. (T9 92-94). The DNA profile from the cart towel, four pop bottles, steering wheel cover and semen stain all matched Appellee, however the semen stain also had one additional DNA type about which she could make no conclusions other than to exclude Machus and Orlando. (T9 96-99). The bathroom towel contained DNA from Orlando and a second donors. Machus was excluded but no conclusive determination could be made as to Appellee. (T9 99-100). There were at least three donors associated with the floor mat blood stain. Machus was excluded. Neither Appellee nor Orlando could be excluded. (T9 101). As to the floor mat hair root, bleach bottle and fired cartridge casings she got no results. (T9 102-104). The fingernails had a single female donor and no foreign DNA. (T9 105). The clothesline wrapper contained at least two donors. There was a match for Orlando. Appellee and Machus were excluded. (T9 105-106). As to the shopping bag handles, Appellee could not be excluded as one of at least three donors. Orlando and Machus were excluded. (T9 106-107). The DNA types from one driver carpet matched Appellee and excluded Machus and Orlando. The other stain was inconclusive. (T9 108). She obtained no DNA from twelve hair roots. (T9 110).

The remaining prosecution exhibits were admitted. (T9 117-120). Over counsel's objection, a certified copy of Appellee's prior conviction was admitted. (T9 124, 126-127). The People rested. (T9 120). Defense counsel's motion for directed verdict was the heard and denied. (T9 125-130).

For the defense, Appellee elected to testify, (T9 131-133), and stated he was a Family Dollar employee and worked with Holt, whom he investigated for theft. (T9 135-139). He was terminated

not for sexual harassment but for violation of policy when he argued with another manager. (T9 139-140). He was unaware of harassment complaints by customers, (T9 183-184), and denied sexually harassing any store employees, stating such claims were instigated by employees he disciplined and by Holt to retaliate for the theft investigation. (T9 141-150). After the termination he immediately secured new employment with a higher salary. (T9 150-151, 185). He did not always wear white gym shoes or his Carhartt coat to work, (T9 152, 186), and did not go to the Family Dollar store on July 15, 2013. At the time of the shooting he was in and out of his apartment. The next day he was at work. (T9 153-157, 188-189). He went to have his Jeep detailed because of a milk spill by his son and having sex in it with Chandler while staying at her mother's house. (T9 157-158, 188). He denied killing Orlando or Machus. He downloaded a video looking for ideas for a movie he was writing. (T9 159-160). The money he had when arrested belonged to him and son. (T9 166-167). He acknowledged his prior criminal sexual conduct conviction and to possession of a handgun, but he denied wilfully failing to register as a sex offender. (T9 168-172).

The defense rested. (T9 213). After a review of jury instructions, (T9 217-228), closing arguments (T10 10-76) and final jury instructions (T10 77-108), Appellee was convicted as charged. (T1112-15). From concurrent terms of life for two counts of felony murder, 37.5 to 60 years for armed robbery, 14.25 to 30 years for unlawful imprisonment, 4.75 to 10 years for felon in possession of a firearm, all consecutive to a term of 2 years for felony firearm, (S 35-37), he appealed of right to the Michigan Court of Appeals. In an opinion dated August 23, 2016, the Court of Appeals vacated Appellee's convictions and remanded his cause to the Wayne Circuit Court for a new trial.

On October 13, 2016, the Wayne County Prosecutor applied for leave to appeal that decision of the Court of Appeals to this Honorable Court. Appellee replies, praying this Honorable Court deny leave to appeal or, in the alternative, that it affirm the decision of the Michigan Court of Appeals.

ARGUMENT I

THE PROSECUTION FAILED TO PRODUCE LEGALLY SUFFICIENT EVIDENCE TO IDENTIFY APPELLEE AS THE PERPETRATOR OR PROVE HIS GUILT BEYOND A REASONABLE DOUBT.

Issue Preservation and Standard of Review

Trial counsel preserved the issue by moving for a judgment of acquittal. (T29 125-130). Even where there is no motion, a claim that a verdict is not supported by the evidence may be raised for the first time on appeal. People v Patterson, 428 Mich 502, 505 (1987). The due process standard of sufficiency of the evidence at trial, viewing the evidence in a light most favorable to the prosecution, requires more than "some evidence" of an element. This standard requires sufficient evidence to permit a rational juror to find proof beyond a reasonable doubt of all elements of the crime. US Const, Ams V, XIV; Const 1963 art 1, §17; Jackson v Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979); People v Hampton, 407 Mich 354 (1979). The standard of review is *de novo*, without deference to the ruling of the Court below. People v Wolfe, 440 Mich 508 (1992). The "beyond a reasonable doubt" standard is constitutionally mandated. In re Winship, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

Discussion

The Due Process Clause prohibits a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 US 358, 361-362; 90 S Ct 1068; 25 L Ed 2d 368 (1970). The reasonable doubt requirement is a due process safeguard, which was developed to protect citizens from "dubious and unjust convictions, which result in improper forfeitures of life, liberty and property." Id, 397 US at 362. As our United States Supreme Court noted in Winship:

> "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-that bedrock `axiomatic and elementary' principle whose `enforcement lies at the foundation of the administration of our criminal law.'"

Id, 397 US at 363. A society that values the good name and freedom of every individual must not

condemn one of its citizens for commission of a crime when there exists reasonable doubt about his guilt. Id, 397 US at 363-364.

Although there is always a margin of error in litigation, where one party has his liberty at stake, this margin of error must be reduced by placing the burden on the other party to persuade the fact-finder of guilt beyond a reasonable doubt. Id, 397 US at 364. Because the reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue, it is indispensable. Id, 397 US at 375.

A directed verdict or judgment of acquittal must be granted if the prosecutor fails to present sufficient evidence of guilt. People v Hampton, 407 Mich 354, 368 (1979). In determining whether a conviction is supported by constitutionally sufficient evidence,

> "[A reviewing court] must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a reasonable trier of fact in finding guilt beyond a reasonable doubt".

Id, 407 Mich at 366, citing, Jackson v Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed 560 (1979). The entire record is reviewed when determining whether the evidence as a whole is sufficient to sustain a conviction. People v Petrella, 424 Mich 221, 269 (1985).

In any criminal prosecution, the state must prove not only that the charged crime occurred, by presenting legally sufficient evidence on all the essential elements of the crime, but also that the charged defendant is criminally responsible for the offense. The evidence in this case on the identification of the perpetrator is conspicuous by its unreliability. Here, numerous witnesses identified Appellee as the person in the Family Dollar store video on July 15, 2013. Appellee, on the other hand, denied going to the store, denied committing the offenses and testified that he was home at the time of the shooting. The gun was not recovered, and there was no credible physical or forensic evidence connecting Appellee to the offense. Surveillance video of the shooting was apparently inclusive. (T8 80-88). Hence, there was no persuasive evidence Appellee was even there.

Here, the prosecution supplemented negligible direct evidence of identification, combined with prejudicial claims of sexual harassment, pornography and prior incarceration to overcome a

stark lack of physical evidence of Appellee's involvement. In In re Winship, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368, 375 (1970), the United States Supreme Court stated as follows:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (Emphasis added.)

The United States Supreme Court has repeatedly held that a conviction must be supported by proof beyond a reasonable doubt as to all of the elements of the offense. Mullaney v Wilbur, 421 US 684, 703; 95 S Ct 1881; 44 L Ed 2d 508, 522 (1975); Ulster County Court v Allen, 442 US 140, 156; 99 S Ct 2213; 60 L Ed 2d 777, 791 (1979); Sandstrom v Montana, 442 US 510, 519-524; 99 S Ct 2450; 61 L Ed 2d 39, 48-51 (1979); Francis v Franklin, 471 US 307; 105 S Ct 1965; 85 L Ed 2d 344 (1985); Rose v Clark, 478 US 570, 580; 106 S Ct 3101; 92 L Ed 2d 460, 472 (1986); Sullivan v Louisiana, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182, 190 (1993); and United States v Gaudin, 515 US 506; 115 S Ct 2310; 132 L Ed 2d 444, 458 (1995). US Const, Ams V & XIV. The evidence presented here was insufficient to identify Appellee as the perpetrator of these offenses or to establish his guilt beyond a reasonable doubt. Appellee's convictions must therefore be vacated.

ARGUMENT II

THE TRIAL COURT VIOLATED APPELLEE'S DUE PROCESS RIGHTS BY ALLOWING THE PROSECUTOR TO PRESENT EVIDENCE OF APPELLEE'S INVOLVEMENT IN SEVERAL ALLEGATIONS OF SEXUAL HARASSMENT, WHERE THE SHEER NUMBER OF OTHER ACTS RESULTED IN UNFAIR PREJUDICE; AND BY PERMITTING PROSECUTION WITNESSES TO TESTIFY TO APPELLEE'S PRIOR INCARCERATION.

Issue Preservation and Standard of Review

Over defense trial counsel's objection, the trial court permitted the prosecutor to introduce evidence of the other acts evidence. (M1 3-24). The "abuse of discretion" standard applies to a trial court's decision to admit similar acts evidence. People v McMillan, 213 Mich App 134, 137 (1995).

Discussion

It is well established that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith. . ." MRE 404(a), and that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." MRE 404(b). Evidence of other wrongful conduct is inadmissible to prove an individual's propensity to commit acts of that type. People v Crawford, 458 Mich 376, 383 (1998). To be admissible, "other act" evidence 1) must be offered for a proper - that is, non-character-based - purpose; 2) must be relevant under Rules 401 and 402; 3) cannot have its probative value be substantially outweighed by the danger of unfair prejudice and other concerns under Rule 403; and 4) must be accompanied by a proper limiting instruction. Id, 458 Mich at 385; People v VanderVliet, 444 Mich 52, 74 (1993), modified 445 Mich 1205 (1994).

Failing any of these tests indicates that the evidence must be excluded. Concerning the first requirement, the link between the defendant and the intended proof must be an inference other than to character. People v Sabin, 463 Mich 43, 60, n7 (2000); People v VanderVliet, supra, 444 Mich at 64, 74. Errors which so infect the trial as to render it fundamentally unfair violate the right to due process of law. US Const, Am XIV; Const 1963, art 1, § 17; McKinney v Rees, 993 F2d 1378, 1380 (CA 9, 1993). See also Michelson v United States, 335 US 469, 475-476; 69 S Ct 213, 218-219; 93 L Ed 168 (1948). In Crawford, the Michigan Supreme Court emphasized that the ban on character

evidence is one which is "deeply rooted in our jurisprudence" and which "'gives meaning to the central precept of our system of criminal justice, the presumption of innocence.'" People v Crawford, supra, 458 Mich at 384 (quoting United States v Daniels, 248 US App DC 198, 205; 770 F2d 1111 (1985)). To that end, it is the prosecution's burden to articulate a proper non-character purpose for the proposed evidence. People v Crawford, supra, 458 Mich at 386-387. The court cautioned that "courts must vigilantly weed out character evidence that is disguised as something else." Id., 388.

Both the due process guarantees of the Michigan and United States constitutions require fundamental fairness in the use of evidence against a criminal defendant. Const 1963, art 1, § 17; US Const, Am XIV. See generally, Lisenba v California, 314 US 219; 62 S Ct 280; 86 L Ed 166 (1941). The improper reference to a defendant's prior acts also violates Federal law. See, e.g., Washington v Hofbauer, 228 F3d 689 (CA 6, 2000) (granting habeas relief in part where defense trial counsel failed to object in a criminal sexual conduct case to evidence that the defendant was unemployed, regularly beat the complainant's mother, consumed alcohol excessively, and failed to make payments on the complainant's mother's home; all of which amounted to improper character evidence).

More particularly, Michigan law limits the admission of evidence of a defendant's other crimes. MCL 768.27 provides:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant

Similarly, MRE 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 403 provides a limitation on otherwise relevant, but prejudicial evidence:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....

Concerning the balancing of probative and prejudicial evidence, Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. In the "other acts" evidence context, "[b]ecause prior acts evidence carries with it a high risk of confusion and misuse, there is a heightened need for the careful application of the principles set forth in MRE 403." People v Crawford, supra, 458 Mich at 398. In People v VanderVliet, 444 Mich 52, 73-75 (1993), our Supreme Court held:

> In place of the four-pronged test of [People v] Golochowicz[, 413 Mich 298; 319 NW2d 518 (1982)], we direct the bench and bar to employ the evidentiary safeguards already present in the Rules of Evidence .... The evidence must be relevant to an issue other than propensity under Rule 404(b) [MRE 404(b)], to "protect[] against the introduction of extrinsic act evidence when that evidence is offered solely to prove character." Id. [Huddleston v United States, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988)] at 687. Stated otherwise, the prosecutor must offer the other acts evidence under something other than a character to conduct theory.
>
> Second, as previously noted, the evidence must be relevant under Rule 402 [MRE 402], as enforced through Rule 104(b) [MRE 104(b)], to an issue or fact of consequence at trial. 2 Weinstein & Berger, Evidence, § 404[08], p 404-49.
>
> Third, the trial judge should employ the balancing process under Rule 403 [MRE 403]. Other acts evidence is not admissible simply because it does not violate Rule 404(b) [MRE 404(b)]. Rather, a "determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403." 28 USCA, p 196, advisory committee notes to FRE 404(b).
>
> Finally, the trial court, upon request, may provide a limiting instruction under Rule 105 [MRE 105].

Under VanderVliet, a prosecutor may not indiscriminately introduce evidence of prior police contact in order to attack a defendant's character. In People v McCartney, 46 Mich App 691 (1973), this Court reversed a defendant's entering without breaking and larceny convictions where the prosecutor called a fingerprint expert who testified to having taken the defendant's fingerprints two years earlier, concluding: "There is no question that the references by the witness were improper and

prejudicial…. It is questionable whether the continued reference to the defendant's prior criminal involvement could be cured by any instruction." Id, p 693-694. Similarly, in People v Wallen, 47 Mich App 612 (1973), this Court ordered a new trial on charges of forgery and uttering and publishing where the prosecutor elicited from a defense witness on cross-examination the fact that the witness had met the defendant while both were in jail. This Court granted relief even in the absence of a timely defense objection. See also, People v McCarver (On Remand), 87 Mich App 12 (1978) (Federal agent improperly testified to executing search warrant to locate firearms illegally possessed by the defendant due to prior felony conviction).

The bare mention of inadmissible evidence may be enough to require a new trial, even where the jury is instructed to disregard it, if "even the most conscientious jurors could [not] avoid being affected by the excluded information." People v Wolverton, 227 Mich App 72, 77-78 (1997). Furthermore, even where other acts evidence satisfies the requirements of MRE 404(b)(1), the sheer number of examples offered may cross the line and violate MRE 403. For example, in State v Frazier, unpublished memorandum opinion of the Hawaii Supreme Court, decided August 29, 2007 (Docket No. 27327) (See Appendix), the court reversed the defendant's conviction of violating a protection order, where the prosecutor had introduced twenty-four prior convictions for violating another protection order, to show the defendant's scheme of disregarding court orders, even though the trial court had given a cautionary jury instruction. The Hawaii Supreme Court, finding unfair prejudice, observed: "the State used the sheer number of … prior convictions as a blunt instrument against [the defendant]." Id, at page 6; compare People v Johnson, 309 Mich App 22 (2015) (in home invasion case, testimony about a single prior similar home invasion not unfairly prejudicial).

In the present case, the prosecutor charged Appellee with 2 counts of premeditated murder, 2 counts of felony murder, armed robbery, unlawful imprisonment, felon in possession of a firearm and felony firearm. for an incident occurring on July 15, 2013, during which Joseph Orlando was shot twice in the head at the Dearborn Family Dollar store, and Brenna Machus was found days later at another location, also shot in the head. The People gave notice of intent to introduce evidence of

"other acts", to wit, the following:

> That the People intend to admit, with the Court's approval, evidence showing that the Defendant has previously been convicted of 1) Breaking and Entering an Occupied Dwelling with intent to commit criminal sexual conduct an two counts of criminal sexual conduct first degree; 2) Defendant's repeated deviant sexual behavior while incarcerated frmo 1995 until his release in 1999; 3) Defendants' conviction for Criminal Sexual conduct Second Degree; 4) Defendant's conviction for Assault with Intent to Commit Great Bodily Harm; 5) Defendant's 21 tickets for sexual misconduct while incarcerated with the Michigan Department of Corrections and 4 tickets for violent outbursts against corrections staff; 6) Defendant's failure to register as a sex offender with his local law enforcement agency after his release from the Michigan Department of Corrections; 7) Defendant was fired from the Family Dollar for the sexual harassment of no less than 11 female co-workers; and 8) Defendant's sexual harassment of a store clerk.
>
> That the evidence the people intend to produce is clearly admissible and relevant to show Defendant's motive and intent to committing the crimes of First Degree Murder and False Imprisonment, specifically as to why he targeted Brenna Machus, an employee of the Family Dollar.

Following a hearing conducted August 1, 2014, (M1 3-16), the trial court summed up the People's position as follows:

> The People believe that the circumstances suggest that a sexual assault accompanied the two homicides and that the first homicide was a necessary part of the defendant's motive to sexually assault and then later kill the second decedent. There is no direct evidence that the decedent was actually sexually assaulted but he People believe that there is circumstantial evidence that would suggest that some sexual assault did occur and that in order to establish, not only the defendant the identity of the suspect, because clearly there's no direct witness who placed the defendant actually at the scene. It's a circumstantial case and so what the People want to be able to do is establish, in essence, that Mr. Bryant was a dangerous person who had a propensity for sexually assaulting and being violent and aggressive towards women and that this is something that has been a part of his regular scheme and way of operating since he was 14 years old when he was first convicted of a sexual related offense and that this pattern of abuse and violence toward women continued until the time where the decedents, in this case, were killed. (M1 18-19).

Conducting a balancing test, the court concluded that the 1993 juvenile conviction was too remote, and that the misconduct while incarcerated was distinctly different, but that his assault with intent to do great bodily harm to a prostitute, was relevant, the sexual harassment complaints go to motive and identity as the perpetrator, given that Machus' clothes were in disarray and she may have been sexually assaulted. (M1 19-24). As a result, Sarah Coulter, Nicole Ricks-Coleman, Alexis Coleman, Amanda Priebe, Dionna Wilson, Aron Watkins, Alyson Holt, Tannisha Fitzpatrick, Cristel

Johnson, Cassidy Flaherty and Jasmin Gregory were permitted to state they were sexually harassed by Appellee, observed him sexually harass others and/or received sexual harassment complaints about him from others and police were permitted to recount finding pornographic video on Appellee's phone. Assuming for the sake of argument each incident was separately admissible for a proper purpose under MRE 404(b)(1), it would have required superhuman restraint for the jury not to consider Appellee a bad person and convict him on propensity to commit crimes. Frazier, supra.

To make matters worse, Michigan State Police Lieutenant Todd Johnson was permitted to state that he went to Marquette Branch Prison to have Appellee sign a sex offender registry responsibility form, (T7 121-126). Ricks-Coleman revealed that Appellee had been in prison before, (T6 12), and David Roe recalled Appellee inquiring about a gun after getting out of jail. (T7 9-10).

This is not conduct that was meaningful to the instant offense. It simply described bad character. In People v Knox, 469 Mich 502 (2004), a first degree murder and first degree child abuse case, the trial court had admitted evidence that the defendant had taken anger management classes, had become increasingly angry at the child victim's mother, had kicked walls and struck other physical objects, and had shoved the child's mother once. Id., 506. The Supreme Court peremptorily reversed the conviction in a unanimous opinion, finding that the past expressions of anger "could only serve the improper purpose of demonstrating that [Defendant] had the bad character or propensity to harm his son." Id., 512-513.

The improper admission of other acts evidence and the improper disclosure that Appellee had been in prison was not harmless. There was no DNA, ballistics or fingerprint evidence that he had committed any of the offense with which he was charged or the uncharged innuendo that Machus was sexually assaulted. There is a real likelihood that he lost the benefit of the doubt after the jury learned he was convicted of criminal sexual conduct, that he had been to prison and that he was accused of multiple instances of sexual harassment involving Family Dollar employees and customers. Therefore, due process requires a new trial. Const 1963, art 1, § 17; US Const, Am XIV.

ARGUMENT III

APPELLEE MUST BE GRANTED A NEW TRIAL BECAUSE POLICE TESTIMONY IDENTIFYING HIM AS THE PERSON IN THE STORE VIDEO IMPERMISSIBLY ENCROACHED ON THE PROVINCE OF THE JURY.

Issue Preservation and Standard of Review

Trial counsel did not object to the testimony. (T2 162-163). This court reviews unpreserved non-constitutional issues for plain error. People v Jones, 468 Mich 345, 382 (2003).

Discussion

Michigan law has expanded the use of expert testimony in areas relevant to criminal issues, and has spoken often to the use of police officers as experts, due to their experience and training, in various areas of evidence. See, for example, People v Murray, 234 Mich App 46 (1999); People v Hubbard, 209 Mich App 234 (1995); People v Matlock, 153 Mich App 171 (1986). The courts have warned, however, that expert police testimony which strays beyond descriptions of common characteristics and profiles into conclusions that the particular accused is guilty, for having demonstrated those characteristics, is inadmissible and highly prejudicial

Here, Dearborn Police Sergeant Thomas Lance viewed about 6 months of store video looking for Appellee and hiss girlfriend, Astrin Chandler. Lance did not identify Appellee or Chandler in the videos, and properly stated as to the April 3, 2013, April 15, 2013, April 17, 2013 and May 28, 2013 videos, "a person who appears to be Mr. Bryant" entered the store. Also, on July 14, 2013 "a person who appears to be Astrin Chandler" entered the store. (T2 126-133). Dearborn Police Corporal Benjamin Harless, who obtained surveillance video from several other nearby businesses, (T3 146-153, 155-156), stated the video of a nearby restaurant showed "the defendant, Mr. Bryant, coming in. He enters the store, appears to place an order, exits, comes back in, and then picks up his food and exits a second time. One observation I made while reviewing is that upon exiting the door, he makes a very discerned motion, of using his arm as he pushes the door open, and again, I noted that it appeared to be very similar in the way that he – that the suspect had opened the door while leaving the Family Dollar, again using his arm in the exact same manner." (T3 162-163).

Harless was not qualified to offer expert opinion yet he stated that it was Appellee in the video. Later, Corporal James Isaacs, asked to compare a February 20, 2013 photo on Appellee's computer wearing a jacket with the jacket in the video stated "I believe it to be the same". (T8 19-21)

Lay witnesses often provide opinions and inferences about a wide range of issues. Sometimes they include information that – while not immediately relevant – helps the jury follow their story. Other times, they simply tell what they saw or heard. That is to be expected. What a witness may not do, however, is tell the jury how other pieces of evidence, not within the scope of the witness's own testimony, demonstrates that the defendant is guilty. Indeed, it is a well-established rule that a witness cannot express an opinion on the defendant's guilt. People v Bragdon, 142 Mich App 197, 199 (1985) ("[I]t is clear that a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense."). When a witness tells the jury that a video shows the defendant committing a crime – especially where the jury is equally well situated to the witness to see what is on the video – it invades the province of the jury. People v Drossart, 99 Mich App 66, 79-81 (1980).

MRE 701 delineates what a lay witness may testify about. It provides, "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

A police officer may narrate a video that he has created or edited, where it is helpful to the jury, and where he does not tell the jury what conclusions to draw. For example, in United States v Begay, 42 F.3d 486 (CA 9, 1994), several men caused a riot that left two people dead. At trial, a police officer narrated an abridged video of the riot. Id. at 502. The Ninth Circuit held that the narration was permissible lay testimony, under FRE 701. It explained that the officer had created the abridged video of the riot by magnifying the videotape and reviewing over 800 photographs taken during the incident, and adding circles to help the jury follow the defendant's movements. Id. Thus, the abridged video was based on his perception of a longer, uncut video of the riot. Id. at 503. Next, it held that the testimony was "likely to have been helpful to the jury in evaluating [the video]." Id.

at 503. The court noted that "one viewing a videotape of a demonstration involving over 200 people would likely not see certain details, given the tremendous array of events all occurring simultaneously." Id. The officer had "spent over 100 hours viewing [the video]" and "could help the jury discern correctly and efficiently the events depicted in the videotape." Id.

Similarly, in People v Fomby, 300 Mich App 46 (2013), several men carjacked and murdered a victim. A police officer reviewed over 6 hours of video footage from a nearby gas station. Id. at 50-52. He then removed several still-frame photographs from the video, which purported to show the defendants and the victim. Id. The purpose "was to determine whether the two suspects involved in the shooting and whose images were captured in the surveillance video had been to the BP gas station before the murder." Id. at 49. At trial, he testified that people in the still-frame photographs were the same people seen in the video. Id. He did not, however, identify the people in the photographs as the defendants. Id. The Court held that his testimony – that the people in the photos were the same as those in the video – was properly admitted MRE 701. Id. at 53. It explained that the officer had knowledge of the original video because he had watched it many times, and that he had used the video to "isolate certain frames to create still images." Id. at 51. Furthermore, the court found that his "testimony helped the jury to correctly and efficiently determine whether the two individual seen earlier in the footage were the same individuals who were involved in the murder." Id. at 51-52. Finally, it noted that the officer "did not identify defendant in the video or still images." Id. at 53. Rather, his "testimony only linked individuals depicted in the surveillance video as being the same individuals depicted in the photographs." Id.

To the contrary, in United States v LaPierre, 998 F.2d 1460 (CA 9, 1993), an officer provided lay testimony that the defendant was the person recorded by a bank's security camera. The Ninth Circuit held that the trial court erred in admitting the evidence, reasoning that the jury "was able to view the surveillance photos of LaPierre and make an independent determination whether it believed that the individual pictured in the photos was in fact LaPierre." Id. at 1465. The Court stated that officers should offer lay testimony about videos and photographs only where there is "reason to

believe that the witness is more likely to identify correctly the person than is the jury." Id.; see People v McCaskill, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2014 (Docket No. 312409) holding that the district court abused its discretion in allowing a police officer to identify a defendant in a video, explaining that "a witness may not identify an individual depicted in a photograph or video when that witness is in no better position to identify the individual than is the jury". On remand for reconsideration under the harmless error standard, the case was again reversed and remanded for a new trial. People v McCaskill (On Remand) , unpublished opinion per curiam of the Court of Appeals, issued November 18, 2014 (Docket No. 312409).

The same principles apply here. Although Lance stated that the persons in other video he reviewed *appeared* to be Appellee and Chandler, Harless testified that the person entering the Family Dollar store July 15, 2013 was in fact Appellee, 9T3 162-163), and Isaacs, when asked to compare a February 20, 2013 photo on Appellee's computer wearing a jacket with the jacket in the video stated "I believe it to be the same". (T8 19-21). Unlike in Fomby and Begay, the testimony of Harless and Isaacs was not helpful to the jury. They were equally positioned with the jury to determine what exactly the images showed. Their opinion was not based upon any expertise or firsthand knowledge to include Appellee as a participant. They invaded the province of the jury.

This testimony was extremely prejudicial. Whether it was Appellee in the July 15, 2013 video was the threshold question in the case. The video was the most important piece of evidence purporting to link Appellee to the crime. The video was indistinct. Harless should not have told the jury what conclusion to draw from the video. His testimony was a basic, prejudicial error involving the most important piece of evidence in the case. Finally, when a prosecutor asks a police officer to draw a conclusion from evidence that the jury is equally well-positioned to evaluate, it impacts the integrity of the judicial system. Indeed, the basic purpose of the jury is to decide questions of fact. When a witness, at the behest of the government, tells the jury what conclusion to draw from a video – especially where the video is the most important piece of evidence in the trial – it undermines the credibility of the judiciary. It was plain error which mandates a new trial.

ARGUMENT IV

THE PROSECUTOR VIOLATED APPELLEE'S STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS TO A FAIR TRIAL, AND USURPED THE FUNCTION OF THE JURY TO BE THE SOLE JUDGE OF WITNESS CREDIBILITY AND TO RETURN A VERDICT BASED SOLELY ON THE EVIDENCE, WHEN SHE ENGAGED IN MISCONDUCT BY TELLING THE JURY THAT APPELLEE WAS A LIAR.

Issue Preservation and Standard of Review

This Court will review improper prosecutorial remarks even in the absence of an objection by trial counsel to avoid a "miscarriage of justice." People v Dalessandro, 165 Mich App 569 (1988). Claims of prosecutorial misconduct are reviewed *de novo* . People v Bahoda, 448 Mich 261, 262-263 (1995); People v McElhaney, 215 Mich App 269 (1996). Also, because this issue involves the interpretation of Appellee's constitutional rights, this Court employs *de novo* review. Cardinal Mooney High School v Michigan High School Athletic Association, 437 Mich 75, 80 (1991). "[q]uestions of prosecutorial misconduct are decided case by case." People v Mack, 190 Mich App 7, 19 (1991). This Court should examine the trial record and evaluate the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. Id.

Discussion

A prosecutor's duty is to seek justice, not merely to convict. People v Farrar, 36 Mich App 294, 299 (1971); Berger v United States, 295 US 78, 88; 55 S Ct 629; 79 L Ed 1314 (1935). Here the prosecutor's conduct went beyond the bounds of propriety. The misconduct denied Appellee his due process right to a fair trial. US Const, Ams V, XIV; Const 1963, art 1, § 17; Donnelly v DeChristoforo, 416 US 637, 639; 94 S Ct 1868; 40 L Ed 2d 431 (1974); People v Bairefoot, 117 Mich App 225, 232 (1982). Criminal defendants in Michigan have a due process right to a fair trial as guaranteed by the Michigan and United States Constitutions. US Const, Ams V, XIV; Const 1963, art 1, § 17. Misconduct on the part of the prosecutor can result in a deprivation of that right.

It is in the province of the jury to decide the credibility of a witness and the guilt or innocence of the defendant. People v Montgomery, 22 Mich App 87 (1970). A prosecutor has a duty to confine closing arguments to the evidence at trial so that a jury will not be encouraged to decide the

issues based on the prestige of the prosecutor's office. People v Yearrell, 101 Mich App 164, 167 (1980). Improper assertions, insinuations, and especially assertions of personal knowledge are apt to carry much weight when they should properly carry none. Berger v United States, supra. The prosecutor's remarks, however, must be read in their entirety with attention to the unique facts of each case. See Bahoda, 448 Mich at 267.

The trial in the instant case was primarily a credibility contest. At the August 1, 2014, motion hearing, the trial court accurately summed up the People's position as follows:

> The People believe that the circumstances suggest that a sexual assault accompanied the two homicides and that the first homicide was a necessary part of the defendant's motive to sexually assault and then later kill the second decedent. There is no direct evidence that the decedent was actually sexually assaulted but he People believe that there is circumstantial evidence that would suggest that some sexual assault did occur and that in order to establish, not only the defendant the identity of the suspect, because clearly there's no direct witness who placed the defendant actually at the scene. It's a circumstantial case and so what the People want to be able to do is establish, in essence, that Mr. Bryant was a dangerous person who had a propensity for sexually assaulting and being violent and aggressive towards women and that this is something that has been a part of his regular scheme and way of operating since he was 14 years old when he was first convicted of a sexual related offense and that this pattern of abuse and violence toward women continued until the time where the decedents, in this case, were killed. (M1 18-19).

Appellee denied killing the decedents and testified that he was elsewhere at the time. (T9 135-172).

Credibility was of the utmost importance, and it is exclusively the jury's responsibility to determine the facts of a case, including whether it believes what each witness says. See M Crim J I 2.4. But in this case the jury was not allowed to perform its exclusive function. Its ability to determine the credibility of the witnesses was improperly infringed upon by prosecutorial comment and unfair bias. Consequently, Appellee was denied his due process right to a fair trial.

During closing argument, the prosecutor repeatedly argued that Appellee was a liar, stating "I don't believe it" (T10 22). "He's lying" (T10 27). "He can't even keep his own lies straight." (T10 34). "It's garbage". (T10 35). "He's a liar", (T10 36). "All of that lies". (T10 37).

The appropriate focus for a prosecutor's argument is the evidence adduced at trial and the reasonable inferences of guilt derived from the evidence. People v Roberson, 90 Mich App 196 (1979); People v Kraii, 92 Mich App 398 (1979). Within these limits prosecutors are accorded great

latitude and may argue vigorously for conviction. Though Michigan courts allow a prosecutor to ask a jury to infer that a witness is lying, People v Howard, 226 Mich App 528, 548 (1997), a prosecutor is not allowed to attempt to persuade the jury with a personal belief that the witness is lying, or to use the prestige of the government office or any supposed extrarecord experiences to vouch for the witness' incredibility. People v Bahoda, supra, 276 (prosecutor may not suggest "special knowledge" of witness credibility); People v Burrell, 127 Mich App 721, 727 (1983) (prosecutor may not point to asserted extrarecord knowledge that witness regularly testified for the defense to insinuate personal belief that witness is liar). The trial prosecutor crossed the line bu calling Appellee a liar.

It is the jury that is charged with the sole responsibility of deciding the facts of a case, and the jury must base that decision exclusively on testimonial evidence and the exhibits accepted into evidence. See M Crim J I 3.5. The jury must decide which witnesses to believe and the importance of each witness' testimony. A jury must employ its own judgment, general knowledge, and common sense to determine the truth. Jurors are instructed to ask themselves certain questions to help determine credibility: could the witness see and hear clearly, was the witness distracted, did the witness seem to have a good memory, what was the witness' demeanor while testifying, did they argue with the attorneys or the judge, and did they seem to make an honest effort to tell the truth. See M Crim J I2.6. It is exclusively the jury's responsibility to determine the facts of a case, including how much it believes what each witness says. See M Crim J I 2.4. But the message here was that the jury should defer to the prosecutor's personal belief in Appellee's lack of credibility.

Reversal is warranted because "a curative instruction could not have eliminated the prejudicial effect". People v Stanaway, 446 Mich 643, 687 (1994). Though the court could have instructed the jury not to consider the prosecutor's argument, such an instruction would certainly have been futile. The prosecutor had already assured them Appellee was a liar. They could hardly be expected to purge that information from their memories. "Whatever the metaphor, the damage was irreparable: the bell could not have been unrung; the ink stain could not have been eradicated; the stench could not have been ignored." People v LaForte, 75 Mich App 582, 584 (1977).

Michigan Courts abhor all forms of prosecutorial misconduct. "[I]t may arouse the prejudice of jurors against a defendant and, hence, lead to a decision based on prejudice rather than on the guilt or innocence of the accused." Bahoda, supra, 266 (footnote omitted). Looking at all the facts in the full context of this case, it cannot be said that the prosecutor's remarks did not deprive Appellee of a fair trial. The prosecutor's improper argument may well have prompted the jury to convict Defendant, thus depriving him of due process and a fair trial. US Const, Ams V, XIV; Const 1963, art 1, § 17; Donnelly v DeChristoforo, supra.

Closing argument is the last word of government counsel to the jury and in our adversary system, it is usually the time when the prosecution delivers its most telling blows against an often-hapless defendant. This advantage already possessed by the government should not be exaggerated by the prosecutor suggesting that the jury defer to the prosecutor's expert knowledge that Appellee is a liar. While the prosecution can comment on evidence, it "may not suggest to the jury that they decide the case on other than the evidence itself." Bairefoot, supra, 231. "[The prosecutor] may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v United States, supra, 88-89.

The prosecutor's closing argument unfairly prejudiced the jury in a case where the issue hinged largely on the jury's determination of the credibility of the witnesses. It cannot be said that the improper closing argument did not affect the jury's decision. Appellee should receive what he has not yet had, a fair trial. The remedy is to reverse and remand Appellee's case for retrial.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellee Lavere Douglas-Lee Bryant prays this Honorable Court deny Plaintiff-Appellant's application for leave to appeal or, in the alternative, affirm the decision of the Michigan Court of Appeals vacating Appellee's convictions and remanding his cause to the Wayne Circuit Court for a new trial.

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